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No. 09-442

IN THE

Supreme Court of the United States

ONEIDA LTD.,

Petitioner,

v.

PENSION BENEFIT GUARANTY CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

When a debtor terminates a pension plan during Chapter 11 bankruptcy reorganization proceedings, liability for the Termination Premium established by 29 U.S.C. § 1306(a)(7) "shall not apply" until the debtor is discharged or dismissed from bankruptcy. In light of this express direction from Congress, did the court of appeals correctly hold that the Termination Premium is not a dischargeable bankruptcy claim?

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Pension Benefit Guaranty Corporation ("PBGC") urges the Court to deny the petition for *certiorari* filed by Oneida Ltd. ("Oneida"). Oneida seeks review of the sole appellate decision applying the termination premium established by 29 U.S.C. § 1306(a)(7) ("Termination Premium") since the statute's enactment in 2006. That decision is sound—predicated on the express direction from Congress that liability for the Termination Premium "shall not apply" until after a company is discharged from bankruptcy. Because this case involves an express congressional directive concerning a federal statutory liability, review of this case would not aid in resolution of Oneida's asserted conflicts over when state law tort and contract liabilities give rise to claims dischargeable in bankruptcy.

FEDERAL STATUTE INVOLVED

The federal statute at issue is 29 U.S.C. § 1306(a)(7). Although Oneida argues that only sections 1306(a)(7)(A) and (B) are pertinent, the Second Circuit opinion below is based on a more complete reading of the statute, and specifically also cites section 1306(a)(7)(C). The statute is attached in full in the Appendix to this brief ("Resp. App.").

STATEMENT OF THE CASE

A. PBGC

PBGC is the federal agency that administers the nation's pension plan termination insurance program established by Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA").[1] When a pension plan covered by Title IV terminates without sufficient assets to pay all of its promised benefits, PBGC typically becomes statutory trustee of the terminated plan and pays participants their benefits, up to the statutory limits.[2] PBGC protects the pensions of nearly 44 million workers and retirees in more than 29,000 private defined benefit pension plans.[3] PBGC's deficit is tens of billions of dollars.[4]

PBGC is self-financed, and obtains its revenues exclusively from five sources: (i) premiums paid by employers sponsoring ongoing plans; (ii) investment income; (iii) the assets in terminated plans; (iv) recoveries, if any, from employers whose underfunded plans have terminated; and (v) the Termination Premium.[5]

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[1] 29 U.S.C. §§ 1001-1461 (2006).

[2] *See* 29 U.S.C. §§ 1321, 1322, 1361.

[3] PBGC 2008 Annual Report, at inside cover, 1, 11, *available at* http://www.pbgc.gov/docs/2008_annual_report.pdf.

[4] PBGC Press Release No. 09-30, May 20, 2009, *available at* http://www.pbgc.gov/media/news-archive/news-releases/2009/pr09-30.html.

[5] PBGC 2008 Annual Report, at inside cover, 13, 44.

B. The Termination Premium

On February 8, 2006, Congress amended ERISA to add the Termination Premium, codified at 29 U.S.C. § 1306(a)(7), which applies to sponsors of underfunded pension plans that terminate under certain circumstances.[6] The statute contains a "General Rule" establishing the Termination Premium, and a "Special Rule" dictating how the Termination Premium applies when a plan terminates during bankruptcy reorganization proceedings.[7]

Under the General Rule, a sponsor whose underfunded plan terminates under prescribed circumstances must pay the Termination Premium to PBGC for each of three 12-month periods after the plan termination date.[8] Under this General Rule, the obligation arises upon termination of the pension plan.[9] The Termination Premium is generally $1,250 per plan participant for each of the three periods.[10] The first period generally begins "with the first month following the month in which the termination date occurs."[11]

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[6] 29 U.S.C. § 1306(a)(7); Resp. App. 1a. Deficit Reduction Act of 2005, Pub. L. 109-171, 120 Stat. 4 (2006).

[7] 29 U.S.C. §§ 1306(a)(7)(A) (General Rule), 1306(a)(7)(B) (Special Rule); Resp. App. 1a-2a.

[8] 29 U.S.C. § 1306(a)(7)(A) & (C); Resp. App. 1a-3a.

[9] *Id.* Oneida incorrectly asserts that the obligation is imposed "immediately before" termination under the General Rule. Pet. at 3. In fact, it is the number of plan participants that is measured as of "immediately before" the termination date. 29 U.S.C. § 1306(a)(7)(B); Resp. App. 2a.

[10] 29 U.S.C. § 1306(a)(7)(A); Resp. App. 1a-2a.

[11] 29 U.S.C. § 1306(a)(7)(C)(i)(I); Resp. App. 2a.

In contrast, under the Special Rule, when a sponsor's plan terminates *during* bankruptcy reorganization proceedings, liability for the Termination Premium "shall not apply to such plan until the date of the discharge or dismissal of such person in such case."[12] In addition, the statute specifies that for plans terminated during bankruptcy reorganization, the first 12-month period begins the month *after* the debtor is discharged from bankruptcy.[13]

Drafted in the midst of increasing concern about the impact of PBGC's deficit on the overall federal deficit, Congress enacted the Termination Premium as part of the Deficit Reduction Act of 2005, and made it permanent by the Pension Protection Act of 2006.[14] Legislative history indicates dual purposes behind the Termination Premium. First, Congress sought to stabilize both PBGC and the overall federal budget, to "protect taxpayers from a possible multi-billion dollar bailout of the federal Pension Benefit Guaranty Corporation (PBGC)."[15] Second,

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[12] 29 U.S.C. § 1306(a)(7)(B); Resp. App. 2a.

[13] 29 U.S.C. § 1306(a)(7)(C)(ii); Resp. App. 3a.

[14] Deficit Reduction Act of 2005, Pub. L. 109-171, § 8101(b), 120 Stat. 4 (2006). 29 U.S.C. § 1306(a)(7)(E) (sunset provision) (repealed); Resp. App. 3a. Pension Protection Act of 2006, Pub. L. No. 109-280, § 401(b)(1), 120 Stat. 780 (2006); C.A. App. A-814.

[15] H.R. Rep. No. 109-745, at 33 (2007)(Pension Protection Act "permanently establishing" the Termination Premium as well as enacting additional pension reforms); C.A. App. A-825. *See also* 151 Cong. Rec. S12912 (Nov. 16, 2005) (remarks by Sen. Levin) (debate on S.1783) (need to strengthen PBGC to avoid possible "taxpayer-financed bailout"); C.A. App. A-811 (*also available at* http://www.gpo.gov/fdsys/pkg/CREC-2005-11-

the Termination Premium was intended to discourage sponsors from "dumping" pension plans on PBGC.[16] Members of Congress noted the probable deterrent effect of the Termination Premium, and the Special Rule in particular:

> [B]y requiring employers that terminate their pensions in bankruptcy to pay an annual premium of $1,250 per participant to the PBGC for the 3 years after they emerge from bankruptcy, this bill makes terminating pension plans a less attractive option for employers. Companies who want to dump their pensions to escape bankruptcy and raise their bottom line will have a tougher time doing so.[17]

16/pdf/CREC-2005-11-16-pt1-PgS12884-2.pdf at 29). *See also* H.R. Rep. No. 109-276, at 62 (2005) (Termination Premium as part of two-pronged pension approach "to put the PBGC on a more secure financial foundation"); C.A. App. A-719.

[16] H.R. Rep. No. 109-276, at 347-48, 356; C.A. App. A-730-32, A-739, *quoted in* Second Circuit's opinion, Pet. App. at 6a. *See e.g.*, 151 Cong. Rec. H11661 (Dec. 15, 2005) (statement of Rep. McGovern) (debate re H.R. 2830) ("The PBGC is an insurance policy for America's workers.... But it is not supposed to be a dumping ground for corporations who want to boost their bottom line and just do not feel like paying the pensions they promised their workers."); C.A. App. A-798 (*also available at* http://www.gpo.gov/fdsys/pkg/CREC-2005-12-15/pdf/CREC-2005-12-15-pt1-PgH11660-5.pdf#page=1 at 2).

[17] 151 Cong. Rec. H11666 (Dec. 15, 2005) (statement of Rep. Souder) (debate re H.R. 2830) (*available at* http://www.gpo.gov/fdsys/pkg/CREC-2005-12-15/pdf/CREC-2005-12-15-pt1-PgH11660-5.pdf#page=1 at 7).

C. Oneida's Bankruptcy

One month after Congress enacted the Termination Premium, Oneida filed a voluntary petition for bankruptcy under Chapter 11 of the Bankruptcy Code.[18] During the bankruptcy proceedings, PBGC and Oneida settled Oneida's sizeable liabilities for its unfunded pension liabilities, unpaid minimum funding contributions, and annual premiums for the one pension plan to be terminated.[19] PBGC received a $3 million promissory note for these unsecured claims of approximately $50 million.[20] But the parties specifically did not resolve whether the Termination Premium is a dischargeable bankruptcy claim, instead reserving their rights to challenge or to enforce the Termination Premium, as Oneida admits and the Second Circuit recognized.[21]

After discharge from bankruptcy, Oneida filed an adversary proceeding against PBGC, seeking a declaration that the Termination Premium was a bankruptcy "claim" under 11 U.S.C. § 101(5) that

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[18] Voluntary Petition, C.A. App. A-65-81.

[19] *See* Stipulation by and Between Reorganized Oneida Ltd. and the Pension Benefit Guaranty Corporation ("Stipulation"), C.A. App. A-575-80.

[20] *Id.* Although Oneida refers to pension underfunding of "approximately $40 million" (Pet. at 4, citing bankruptcy court decision, Pet. App. 9a-10a), Oneida's own actuary estimated the underfunding to be approximately $50 million. Declaration of Sheila L. Yoensky [filed by Oneida], C.A. App. A-933-35.

[21] Stipulation, at C.A. App. A-576-77, A-579; Pet. at 5; Pet. App. at 3a (parties "preserv[ed] their respective rights to dispute or enforce payment of Termination Premiums").

had been discharged in the bankruptcy.[22] Pending the outcome of the litigation, the Parties established an escrow account into which Oneida placed the first two installments of its Termination Premium.[23] Oneida secured its third installment through an irrevocable standby letter of credit in PBGC's favor.[24]

The bankruptcy court ruled in Oneida's favor, concluding that a bankruptcy claim for the Termination Premium arises at plan termination, and that the Special Rule merely made the claim contingent.[25] The parties then jointly sought and obtained a direct appeal to the Second Circuit.

D. The Second Circuit's Decision

On April 8, 2009, the Second Circuit reversed the bankruptcy court's holding that the Termination Premium is a contingent pre-petition claim, dischargeable in bankruptcy. Proceeding from the plain language of the statute, the court determined that the Termination Premium did not apply to Oneida until its discharge from bankruptcy.[26] The court rejected the bankruptcy court's conclusion that the Termination Premium was a contingent claim, or "an obligation [that] has already been created prior to bankruptcy but is subject to a contingency."[27]

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[22] Complaint for Declaratory Relief, C.A. App. A-626-37.

[23] Escrow Agreement, C.A. App. A-639-58.

[24] Together, the escrow account and the letter of credit secure Oneida's liability of about $7 million for the Termination Premium, plus interest, pending final judgment in this case.

[25] Pet. App. at 21a.

[26] Pet. App. at 5a-7a.

[27] *Id.* at 5a.

Instead, the court concluded that "an employer's obligation to pay a Termination Premium on a pension plan that is terminated during the course of the bankruptcy does not even arise until the bankruptcy itself is terminated" and that "[n]o matter how broadly the term 'claim' is construed, it cannot extend to a right to payment that does not yet exist under federal law."[28] The court perceived no ambiguity in the statute, but noted that, even if there were, the legislative history of the Deficit Reduction Act and the Pension Protection Act were in "PBGC's favor."[29] The court held that the Termination Premium is not a claim in bankruptcy and, thus, not dischargeable.

ARGUMENT

I. BECAUSE A FEDERAL STATUTE, NOT STATE LAW OR FEDERAL COMMON LAW, SUPPLIES THE RULE OF DECISION, THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND ANY OTHER CIRCUIT DECISION.

Oneida seeks to invoke this Court's *certiorari* jurisdiction to resolve a conflict that is not present in this case. Oneida argues that the court's reasoning below is "consistent with" the Third Circuit's decision in *In re M. Frenville Co. Inc.*,[30] and that *Frenville* conflicts with the decisions of six other Circuits. In those decisions, the courts developed various federal common law rules to assess when a

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[28] *Id.* at 5a-6a.

[29] *Id.* at 6a.

[30] Pet. at 7; 744 F.2d 332 (3d Cir. 1984).

bankruptcy claim arises, rejecting *Frenville's* use of state law. But because the liability for the Termination Premium "shall not apply" until a debtor's discharge, Congress has expressly answered the question when that liability arises for a reorganizing plan sponsor. Thus, a federal statute, not state law or federal common law, supplies the rule of decision. Oneida posits a false conflict.

The Second Circuit did not rely on or even cite to *Frenville*. *No* party had cited *Frenville* before Oneida's motion for rehearing below. In *Frenville*, the court applied state law in determining whether a bankruptcy claim arose post-petition and thus avoided the automatic stay, noting that "[i]f there were some overriding federal policy, we might have the power to develop federal law."[31] The Circuit decisions cited by Oneida developed various federal common law rules, believing that *Frenville's* rule unduly narrowed the scope of "claim" under 11 U.S.C. § 101(5).[32] But neither *Frenville* nor any of

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[31] 744 F.2d at 337 n.8.

[32] *In re Parker*, 313 F.3d 1267 (10th Cir. 2002) (applying "conduct" theory to legal malpractice under state law); *Butler v. NationsBank, N.A.*, 58 F.3d 1022 (4th Cir. 1995) (applying "conduct" theory to forged checks under state law); *Epstein v. Official Comm. of Unsecured Creditors (In re Piper Aircraft)*, 58 F.3d 1573 (11th Cir. 1995)(applying "pre-petition relationship" test to product liability under state law); *Lemelle v. Universal Mfg. Corp.*, 18 F.3d 1268 (5th Cir. 1994) (same); *In re Chicago, Milwaukee, St. Paul & Pacific RR Co.*, 974 F.2d 775 (7th Cir. 1992) (balancing CERCLA and Bankruptcy Code policies, where federal non-bankruptcy law did not dictate treatment in connection with bankruptcy); *In re Hassanally*, 208 B.R. 46 (B.A.P. 9th Cir. 1997) (applying "fair contemplation" test to negligent construction claim under state law); *In re Jensen*, 995

the other Circuit cases decided whether a bankruptcy claim exists when a federal statute explicitly provides that the liability under the statute applies only upon the debtor's discharge or dismissal from bankruptcy.

In this case, a federal statute determines whether *any* bankruptcy claim for the Termination Premium exists when a pension plan is terminated during bankruptcy reorganization. In applying the "unambiguous" language of the Special Rule, the Second Circuit concluded that "[n]o matter how broadly the term 'claim' is construed, it cannot extend to a right to payment that does not yet exist under federal law."[33] Thus, the varying federal common law rules that other Circuits have used to determine how tort- or contract-based claims are treated in bankruptcy are wholly inapplicable in this case. And resolving a conflict between them and *Frenville* will not resolve the question presented here, which is not the subject of any conflict between the Circuits. Nor would addressing the issue presented here resolve the *Frenville* conflict.

This Court has made clear that "federal common law is 'subject to the paramount authority of Congress.'"[34] Federal common law is "resorted to '[in] absence of an applicable Act of Congress,'"[35]

F.2d 925 (9th Cir. 1993) (hazardous waste cleanup under state law).

[33] Pet. App. at 6a.

[34] *Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981), *quoting New Jersey v. New York*, 283 U.S. 336, 348 (1931).

[35] *Milwaukee*, 451 U.S. at 314, *quoting Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943).

when courts are "compelled to consider federal questions 'which cannot be answered from federal statutes alone.'"[36]

In this case, an express congressional direction addresses the issue presented, making resort to federal common law inappropriate. The Second Circuit viewed the statutory language as dispositive: "Congress may prescribe when a claim will be legally effective for the purposes of the Bankruptcy Code, at least where, as here, the non-bankruptcy statute *explicitly* discusses how the obligation should be treated in bankruptcy."[37] As the Court stated in *O'Melveny & Myers v. FDIC,* the argument that statutory language should be read as "supplemented or modified by federal common law" is "demolished" by provisions of the statute that directly address the matter.[38] Accordingly, the Second Circuit properly applied the explicit statutory language rather than judicially created common law that would negate the statute.

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[36] *Id., quoting D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 469 (1942) (Jackson, J., concurring).

[37] Pet. App. at 5a (emphasis in original). The Second Circuit noted that the result might be different if the case involved a contract, rather than an explicit federal statute. *Id.*

[38] 512 U.S. 79, 86 (1994); *see also NWA v. Transport Workers Union*, 451 U.S. 77, 95 n.34 (1981) ("[O]nce Congress addresses a subject, even a subject previously governed by federal common law, the justification for lawmaking by the federal courts is greatly diminished. Thereafter, the task of the federal courts is to interpret and apply statutory law, not to create common law.")

In sum, resolving the alleged conflict Oneida describes—about when contingent bankruptcy claims arise in the absence of federal statutory direction—would not dispose of this case. And this case is not a vehicle for resolving that conflict, because the Special Rule has displaced federal common law. Not only is the ruling below the first Circuit court decision concerning the Special Rule, it is the only Circuit court decision to address *any* aspect of the Termination Premium in the three years since its enactment. This is neither the right case nor the right time to resolve the conflict suggested by Oneida.

II. BECAUSE THE DECISION BELOW IS BASED ON THE DECISIONS OF THIS COURT, IT PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW TO BE SETTLED BY THIS COURT.

The petition also fails to raise a worthwhile federal question. As this Court has emphasized, "[c]reditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation, subject to any qualifying or contrary provisions of the Bankruptcy Code."[39] Under *Travelers* and *Raleigh*, the substantive non-bankruptcy law that gives rise to a debtor's obligation determines the existence and validity of a bankruptcy claim for that obligation.[40]

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[39] *Travelers Cas. & Sur. Co. of Am. v. PG&E*, 549 U.S. 443, 450 (2007), *quoting Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20 (2000).

[40] *Travelers*, 549 U.S. at 450; *Raleigh*, 530 U.S. at 20.

In this case, the substantive non-bankruptcy law—ERISA—explicitly states that the Termination Premium does not apply to a debtor until it emerges from bankruptcy. As the Second Circuit held, it is "apparent from the face of the relevant statutory provisions that '[i]n the case of termination due to reorganization, the liability for the [termination] premium *does not arise* until the employer is discharged from the reorganization proceeding.'"[41] "The obvious purpose of this rule," the court held, "is to prevent employers from evading the Termination Premium while seeking reorganization in bankruptcy."[42] As the court noted, even if there were any ambiguity in the statute, the legislative history confirms this clear purpose.[43]

Oneida does not argue that the statutory language is ambiguous, or that Congress lacked authority to enact it. It merely observes that Congress did not "impliedly" amend the Bankruptcy Code.[44] PBGC agrees. There was no need, as the Termination Premium expressly does not apply to a reorganizing debtor until it emerges from bankruptcy. Thus, while Oneida continues to assume that the Termination Premium is a bankruptcy "claim," even mischaracterizing the Second Circuit's decision as "not disturbing" the bankruptcy court's "factual finding" concerning "PBGC's claim for Termination Premiums,"[45] the

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[41] Pet. App. at 3a (citation omitted) (emphasis in original).

[42] *Id.* at 5a.

[43] Pet. App. at 6a-7a.

[44] Pet. at 13.

[45] Pet. at 6, 12.

court of appeals clearly ruled that no such bankruptcy claim existed. Because this holding is fully consistent with the decisions of this Court, it presents no ground for review.

III. THE PETITION'S POLICY ARGUMENTS PROVIDE NO REASON TO GRANT REVIEW.

Oneida urges the Court to grant review to prevent forum-shopping by companies that seek to avoid paying the full Termination Premium to make their reorganizations more "effective."[46] Oneida suggests that review is necessary to keep debtors from shopping for a bankruptcy court outside the Second or Third Circuit in the hope of paying only a portion of this liability. But no other Circuit has addressed this issue. And many companies have continued to file Chapter 11 petitions in Delaware and New York after the lower court's decision of April 8, 2009, notwithstanding substantial pension obligations.[47]

Moreover, helping companies to avoid the Termination Premium is no reason to grant review. As Oneida recognizes, shoring up the federal pension

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[46] Pet. at 14.

[47] A few examples include Cooper-Standard Automotive, Inc., No. 09-12743 (PJW) (Bankr. D. Del.) (filed Aug. 3, 2009), Lear Corporation, No. 09-14326 (ALG) (Bankr. S.D.N.Y.) (filed Jul. 7, 2009), Six Flags, Inc. No. 09-12019 (CSS) (Bankr. D. Del.) (filed Jun. 13, 2009), General Motors Corp., No. 09-50026 (REG) (Bankr. S.D.N.Y.) (filed Jun. 1, 2009), Visteon Corp., No. 09-11786 (CSS) (Bankr. D. Del.) (filed May 28, 2009), Mark IV Industries, No. 09-12795 (SMB) (Bankr. S.D.N.Y.) (filed Apr. 30, 2009), and Chrysler, LLC, No. 09-50002 (AJG) (Bankr. S.D.N.Y.) (filed Apr. 30, 2009).

insurance program—admittedly a "worthwhile objective"—was Congress's "ostensible primary purpose" in implementing the Termination Premium.[48] Indeed, PBGC's significant deficit—at that time $22.8 billion—and the growing trend of plan sponsors' use of Chapter 11 reorganization to force their pension obligations onto PBGC were principal reasons for the enactment of the Termination Premium.[49] The Congressional Budget Office estimated that collections from the Termination Premium would total about $1 billion between 2006 and 2010 and $1.4 billion between 2006 and 2015, without discounting for any limited recovery in bankruptcy, thereby helping to alleviate PBGC's continuing financial difficulties.[50]

Although Oneida would nevertheless like the Termination Premium to be "subject to compromise and discharge in bankruptcy court" (Pet. at 17), that is an argument for Congress, not the Court.

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[48] Pet. at 17.

[49] *See, e.g.*, H.R. Rep. No. 109-232, pt. 2, at 114 (2005), C.A. App. A-704 (*also available at* 2005 WL 3343873); H.R. Rep. No. 109-745, at 6, 32, C.A. App. A-823-24; 151 Cong. Rec. S12067 (Oct. 31, 2005) (remarks by Sen. Gregg), C.A. App. A-760 (*also available at* http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=S12067&dbname=2005_record); 151 Cong. Rec. S12912 (Nov. 16, 2005) (remarks by Sen. Levin), C.A. App. A-811 (also available at http://www.gpo.gov/fdsys/pkg/CREC-2005-11-16/pdf/CREC-2005-11-16-pt1-PgS12884-2.pdf at 29); 152 Cong. Rec. H6160 (Jul. 28, 2006) (remarks by Rep. Boehner), C.A. App. A-827 (*also available at* http://www.gpo.gov/fdsys/pkg/CREC-2006-07-28/pdf/CREC-2006-07-28-pt1-PgH6040.pdf at 121).

[50] Congressional Budget Office Cost Estimate, S.1932, Deficit Reduction Act of 2005, at 75, 109th Cong. (Jan. 27, 2006), C.A. App. A-779.

Congress expressly and knowingly imposed the Termination Premium on companies that emerge from bankruptcy reorganization after shifting their pension obligations onto the federal insurance program. Congress emphasized that "[t]he bankruptcy courts should not be used as a mechanism for eliminating the burden of an underfunded pension plan; therefore, an additional premium paid to the PBGC to recognize the agency's assumption of unfunded plan liabilities is reasonable."[51] As the Second Circuit held, allowing compromise and discharge of the Termination Premium as a "bankruptcy claim" would "directly thwart Congress's aim" in making it applicable only upon the company's emergence from bankruptcy.[52]

In sum, Oneida's policy arguments provide no more basis than its legal arguments for this Court to grant review. Oneida has no evidence to show that the Second Circuit's decision has led to any forum-shopping. Yet PBGC's massive deficit suggests a continuing need for the financial recovery the Termination Premium provides. Oneida has not made the case for review.

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[51] H.R. Rep. No. 109-276, at 348, *quoted in* Second Circuit's opinion, Pet. App. at 6a.

[52] Pet. App. at 7a.

CONCLUSION

For the foregoing reasons, the Court should deny Oneida's petition for writ of *certiorari*.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES CODE SERVICE
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*** CURRENT THROUGH PL 110-324, APPROVED 9/24/2008 ***

TITLE 29. LABOR
CHAPTER 18. EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
PLAN TERMINATION INSURANCE
PENSION BENEFIT GUARANTY CORPORATION

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29 USCS § 1306

§ 1306. Premium rates

(a) Schedules for premium rates and bases for application; establishment, coverage, etc.

...

(7) Premium rate for certain terminated single-employer plans.

(A) In general. If there is a termination of a single-employer plan under clause (ii) or (iii) of section 4041(c)(2)(B) [*29 USCS § 1341(c)(2)(B)*] or section 4042 [*29 USCS § 1342*], there shall be payable to the corporation, with respect to each applicable 12-

month period, a premium at a rate equal to $ 1,250 multiplied by the number of individuals who were participants in the plan immediately before the termination date. Such premium shall be in addition to any other premium under this section.

(B) Special rule for plans terminated in bankruptcy reorganization. In the case of a single-employer plan terminated under section 4041(c)(2)(B)(ii) [*29 USCS § 1341(c)(2)(B)(ii)*] or under section 4042 [*29 USCS § 1342*] during pendency of any bankruptcy reorganization proceeding under chapter 11 of title 11, United States Code [*11 USCS §§ 1101* et seq.], or under any similar law of a State or a political subdivision of a State (or a case described in section 4041(c)(2)(B)(i) [*29 USCS § 1341(c)(2)(B)(i)*] filed by or against such person has been converted, as of such date, to such a case in which reorganization is sought), subparagraph (A) shall not apply to such plan until the date of the discharge or dismissal of such person in such case.

(C) Applicable 12-month period. For purposes of subparagraph (A)—

(i) In general. The term "applicable 12-month period" means—

(I) the 12-month period beginning with the first month following the month in which the termination date occurs, and

(II) each of the first two 12-month periods immediately following the period described in subclause (I).

(ii) Plans terminated in bankruptcy reorganization. In any case in which the requirements of subparagraph (B) are met in connection with the termination of the plan with respect to 1 or more persons described in such subparagraph, the 12-month period described in clause (i)(I) shall be the 12-month period beginning with the first month following the month which includes the earliest date as of which each such person is discharged or dismissed in the case described in such clause in connection with such person.

(D) Coordination with section 4007.

(i) Notwithstanding section 4007 [*29 USCS § 1307*]—

(I) premiums under this paragraph shall be due within 30 days after the beginning of any applicable 12-month period, and

(II) the designated payor shall be the person who is the contributing sponsor as of immediately before the termination date.

(ii) The fifth sentence of section 4007(a) [*29 USCS § 1307(a)*] shall not apply in connection with premiums determined under this paragraph.

(E) [Repealed]